**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JEFFREY GIBSON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 208,554 |
| **IBP, INC.** | ) | |
| Respondent, | ) | |
| Self-Insured | ) | |

## ORDER

The respondent appealed the October 14, 1998 Award entered by Administrative Law Judge Brad E. Avery. Appeals Board Member Gary M. Korte recused himself from participating in this proceeding. The Director appointed Ms. Stacy Parkinson of Olathe, Kansas, to serve as Appeals Board Member Pro Tem. The Appeals Board heard oral argument on September 1, 1999.

### APPEARANCES

Thomas M. Warner Jr., of Wichita, Kansas, appeared for the claimant. Jennifer L. Hoelker of Dakota City, Nebraska, appeared for the respondent.

### RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

### ISSUES

Citing the Berry[1] decision, the Judge found the appropriate date of accident for claimant's bilateral arm injuries to be January 31, 1996, when claimant was laid off because of his injuries. The Judge also found that claimant gave timely notice of his injuries. And although the symptoms in the left hand began approximately nine months

[1] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

after symptoms began in the right hand, citing the Depew[2] decision, the Judge found that claimant simultaneously injured his arms. Averaging a 37 percent task loss and a 48 percent difference in pre- and post-injury wages, the Judge found claimant had a 42.5 percent permanent partial general disability.

The respondent argues that Judge Avery erred by (1) granting claimant benefits for the avascular necrosis (Kienbock's disease) that he developed in the right hand as that is a hereditary disease and, therefore, allegedly not related to his work, (2) granting claimant benefits for anything more than a scheduled injury to the right wrist as claimant did not have left wrist complaints until September 1995 and he never filed an application for hearing for a September 1995 accident, (3) granting claimant permanent partial disability benefits when he allegedly was never disabled for at least one week as required by K.S.A. 44-501(c), (4) finding that claimant was entitled to receive a permanent partial general disability when claimant allegedly sustained two separate accidents and "scheduled" injuries,[3] if anything, rather than simultaneous injury to the hands and arms, (5) finding that claimant was entitled to a work disability rather than his functional impairment rating as claimant allegedly failed to exert a good faith effort either to retain his employment with the respondent or to obtain other employment, (6) failing to impute as the post-injury wage the amount that claimant earned while working for the respondent, and (7) failing to find that Mr. Hardin's list of former job tasks included duplicates and, therefore, failing to find that claimant lost, if any, 18 of 33 job tasks rather than 21 of 36.

Conversely, the claimant contends that (1) the injuries to his hands and arms should be treated as an "unscheduled" injury[4] to the body rather than two separate scheduled injuries, (2) the appropriate date of accident for this repetitive use injury should be his last day of working for the respondent on January 31, 1996, (3) his actual post-injury wages should be used to compute his permanent partial general disability rating as he allegedly has made a good faith effort to obtain appropriate employment, and (4) his permanent partial general disability rating should be increased from 42.5 percent to 56.5 percent.

The issues before the Appeals Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with the respondent?

2. What is the appropriate date (or dates) of accident for the injuries that claimant sustained?

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[2] Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, 947 P.2d 1 (1997).

[3] See K.S.A. 44-510d.

[4] See K.S.A. 44-510e.

3. Did claimant provide the respondent with timely notice of the accidental injury?

4. Did claimant's injuries disable him the prerequisite period of time to entitle him to receive permanent partial disability benefits?

5. What is the nature and extent of claimant's injuries and disability?

## FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Jeffrey Gibson began working for IBP, Inc., in December 1982. From 1982 through October 1994, Mr. Gibson performed several different jobs in the beef processing plant requiring the forceful, repetitive use of his hands using a hook and knife.

2. In October 1994, Mr. Gibson began having severe pain in his right wrist (his dominant hand). Mr. Gibson reported the symptom to the IBP nurse, who then gave him a wrist splint and restricted him from using the right hand. The company then placed Mr. Gibson in the job of picking bones and fat from conveyor belts, which he did using his left hand only. From October 1994 through his last day of work for IBP on January 31, 1996, Mr. Gibson worked using his left hand only.

3. In January 1995, Mr. Gibson began treating with Dr. John B. Moore IV, who is board certified in plastic and reconstructive surgery and who is also qualified in hand surgery. Dr. Moore diagnosed Kienbock's necrosis in Mr. Gibson's right wrist, which is a condition where the lunate bone fragments and collapses as it loses blood supply. The doctor placed Mr. Gibson's right wrist in a cast for two months hoping for the lunate to revascularize. The doctor also restricted Mr. Gibson from using his right hand for hook and knife work and from lifting more than 20 pounds with the right arm. In his January 31, 1995 letter to IBP, the doctor noted:

> The real story is told on x-ray. He had avascular necrosis of his lunate (Kienbock's disease). This is caused by injury to the blood supply of the lunate bone either by a single blow to the wrist or to multiple microtraumas such at [sic] what we get with 12 years of knife use. With loss of blood supply, the bone dies and starts to collapse. As it collapses, it loses its motion which gives him the stiffness at the wrist. It is most impressive that he has as little pain as he admits to with the severity of his Kienbock's disease. This is a fairly advanced Kienbock's disease. Certainly, it is at least stage II and approaching stage III as the bone collapses. . . .
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> **I'm afraid his days of using the right hand with a knife or hook are over,** but the arm should still be quite useful for lifting as long as the

> pressure is traction, not flexion. **We want to keep him away from jobs that require wrist flexion or place compression on the wrist.** Sorting jobs should be adequate, and again, lifting jobs in the smaller weight range of around 20 pounds, should be appropriate. . . .He should not have to grip too much pressure also because that will add compression to the lunate from the action of his flexor tendons. (Emphasis added.)

4. Dr. Moore saw Mr. Gibson again in March, June and September 1995. In June 1995, the doctor released Mr. Gibson to return to full duty with the requirement that he use a splint on his right wrist and refrain from lifting, pushing, or pulling more than 50 pounds. Mr. Gibson continued to work. But by September 1995, Mr. Gibson was having carpal tunnel syndrome symptoms in his left hand and wrist, which he attributed to overcompensating for the right wrist.

5. In December 1995, Mr. Gibson again saw Dr. Moore. Mr. Gibson's right lunate was improving on X-ray. And the left carpal tunnel symptoms were under good control as Mr. Gibson really only noticed those symptoms when he worked in the cold. Therefore, Dr. Moore offered Mr. Gibson two options – left carpal tunnel release surgery or restrictions from working in the cold. Mr. Gibson declined surgery and opted for the restriction.

6. Responding to the restriction against working in cold environments, IBP moved Mr. Gibson from the picking job to the laundry where he could work in a warmer environment. At that time, IBP advised Mr. Gibson that he had 30 days to bid on and obtain a regular job in the plant or that he would be placed on leave of absence.

7. On January 31, 1996, IBP placed Mr. Gibson on leave of absence. According to company policy, workers on leave of absence have one year to bid on and obtain a regular job in the plant or they are terminated. According to policy, the company terminated Mr. Gibson on February 1, 1997.

8. In June 1996, while Mr. Gibson was on leave of absence, IBP wrote Dr. Moore and asked him to review a videotape of six jobs. Out of those six jobs, the doctor identified the manifestor and scale operator jobs as the two best for Mr. Gibson. Recognizing that those jobs were performed in the cold, the doctor suggested to IBP that Mr. Gibson use either heated or insulated gloves. The pre-eviscerator job was also shown on the videotape. But as that job required the worker to climb up onto a stand, the doctor found that job would be dangerous for Mr. Gibson due to his wrist pain.

9. After reviewing the results of a functional capacity evaluation, Dr. Moore wrote IBP on July 30, 1996. The doctor advised that Mr. Gibson should be restricted from lifting or handling more than 50 pounds with his right hand and arm, should avoid exerting more than 10 pounds of pinch strength, should avoid repetitive wrist motion, and constantly use a splint to avoid wrist flexion and extension. Although the doctor had earlier advised that

Mr. Gibson could no longer do hook and knife work, the doctor failed to specifically mention that restriction in his letter. The doctor wrote:

> . . . We think about the "injury" which is a dead bone that has partially collapsed because of loss of blood supply, we can merge the information from the FCE with [a] common sense preventive approach.
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> I certainly think a 50 pound lifting, carrying, pushing, pulling and gripping restrictions [sic] is certainly reasonable based on these findings. Anything more will place undo [sic] axial compression on an already compressed bone. The other thing he needs to keep away from is repetitive wrist motion since that will stretch out the small blood vessels that are trying to grow back into the A-vascular [sic] bone. He must use a wrist splint constantly to prevent more than 10-20 degrees of wrist flexion and extension at work. Therefore, any job that can be performed in a rigid wrist splint in a neutral position with less than 50 pounds of grip strength or 10 pounds of pinch strength should be adequate and appropriate. Extreme cold will not increase the injury but may be symptomatically painful to any patient with a wrist injury.

10. After being placed on leave of absence and until such time as he moved to the Kansas City area in October 1996, Mr. Gibson visited the IBP plant once each week to check the bid board on the processing side of the plant. During that same period, IBP wrote Mr. Gibson on several occasions encouraging him to bid on various jobs. Because Dr. Moore did not specifically restrict Mr. Gibson from using a hook and knife in his July 30, 1996 letter, some of the jobs that IBP encouraged Mr. Gibson to consider violated the restriction against hook and knife work. Mr. Gibson did not bid on any of the jobs that were posted on the bid board because, based upon his many years of experience working in the plant, he believed those jobs would have violated his medical restrictions and limitations.

11. Because of personal convictions against the mass killing of animals and believing that he was unable to tolerate working on the slaughter side of the plant, Mr. Gibson did not consider any of the slaughter jobs, except the pre-eviscerator job. Because that job required him to climb atop a stand, an activity that Dr. Moore told Mr. Gibson to avoid, Mr. Gibson did not bid on that job. Mr. Gibson did not believe that he could physically perform the other slaughter jobs as most, if not all, required repetitive hand movement. Mr. Gibson testified:

> Q. (Mr. Warner) What did you do?
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> A. (Mr. Gibson) I regularly weekly went in and reviewed the bid board for a job. I-- I looked at all the jobs and I had been there for twelve years, I knew what they consisted of. They were offering me jobs that would have me using tools in my right hand when my restrictions already prohibited it. And--

> and I didn't put in for anything that I knew that I couldn't do by my restrictions or that-- Doctor Moore had said not to do anything that would affect pain, which would damage the bone any further.

12. Considering the whole record, the Appeals Board finds Mr. Gibson's beliefs as to whether certain jobs posted on the bid board fell within his medical restrictions to be reasonable and in good faith.

13. In October 1996, Dr. Moore determined that Mr. Gibson had reached maximum medical recovery and rated him. In an October 15, 1996 letter to IBP, the doctor wrote that Mr. Gibson had reached maximum medical improvement and that, according to the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides), he had a 7 percent functional impairment to the right upper extremity. The doctor's letter also identified the permanent work restrictions that the doctor was placing on Mr. Gibson. The doctor wrote:

> At the present time, no further surgical or medical treatment is necessary, but at some time in the future he may need reconstruction of the wrist. His permanent restrictions include using the splint at work, no use of a knife or hook with the right hand and 50 lb lifting restriction. Mr. Gibson may find that cold environments increase aching pain in the wrist which should be considered in assigning jobs in the future.

14. In October 1996, unable to find work in Emporia, Kansas, Mr. Gibson moved to Independence, Missouri, and began working in a children's garment factory operating a sewing machine. Mr. Gibson found that job appropriately accommodated his medical restrictions against using hand tools, working in the cold, hard grasping, and repetitively using his upper extremities. At the time of the May 1998 regular hearing, Mr. Gibson testified that he was earning $6.38 per hour working 40 hours per week in the garment factory. Therefore, Mr. Gibson's post-injury wage commencing on or about November 1, 1996, is $255.20 per week.

15. Dr. Moore saw Mr. Gibson one last time in May 1997. In his letter to IBP dated May 30, 1997, the doctor rated Mr. Gibson as having a 5 percent functional impairment to the left upper extremity due to the carpal tunnel. Additionally, the doctor increased the functional impairment to the right upper extremity to 11 percent, which combines with the impairment to the left upper extremity to create a 10 percent functional impairment to the whole body. The doctor attributed the increased impairment from the Kienbock's disease to its progressive nature and the passage of time. But the doctor also acknowledged that the difference in the 1996 and the 1997 impairment ratings for the right upper extremity could be due to a variation in testing and that the different ratings may not actually represent a change in Mr. Gibson's condition.

16. Dr. Moore testified that he believes the Kienbock's disease was either caused or aggravated both by congenital factors and the repetitive and extreme nature of Mr. Gibson's work at IBP. Additionally, the doctor testified that it is very probable that the carpal tunnel syndrome was linked to the decreased use of the right hand that resulted from the Kienbock's disease, coupled with the years of work that Mr. Gibson did for IBP. The doctor testified:

> Q. (Mr. Warner) What caused the problem with carpal tunnel in the left upper extremity; was it the weight of the objects that he was moving or was it the repetitive motion?
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> A. (Dr. Moore) All of the above plus the preceding 13 years of work.

17. In December 1996, Dr. Pedro Murati evaluated Mr. Gibson at his attorney's request. Dr. Murati diagnosed aseptic necrosis in Mr. Gibson's right wrist and carpal tunnel or overuse syndrome in the left wrist. Using the fourth edition of the AMA Guides, the doctor rated Mr. Gibson as having a 16 percent whole body functional impairment. The doctor recommended that Mr. Gibson avoid highly repetitive work.

18. Due to the injuries to both wrists and arms, Mr. Gibson has lost the ability to perform several of the work tasks that he did in the 15-year period before his symptoms and injuries manifested themselves. Considering the task list prepared by IBP's vocational rehabilitation expert Karen Crist Terrill, Dr. Moore indicated that Mr. Gibson had lost the ability to perform nine of a total of 24 work tasks, which creates a work task loss of 38 percent. On the other hand, Dr. Murati considered the task list prepared by Mr. Gibson's vocational expert Jerry Hardin and indicated that Mr. Gibson had lost the ability to perform 19 of 29 work tasks, which creates a work task loss of 66 percent.[5]

19. The Appeals Board is not persuaded that the 38 percent task loss is any more accurate than the 66 percent task loss. Therefore, the Appeals Board finds that Mr. Gibson's task loss lies somewhere between 38 and 66 percent. Averaging those percentages, the Appeals Board concludes that Mr. Gibson has lost the ability to perform 52 percent of his former work tasks.

20. Regarding wage loss, for the period from January 31, 1996, to November 1, 1996, Mr. Gibson was on leave of absence and unemployed. Therefore, Mr. Gibson's wage loss for that period was 100 percent. For the period commencing November 1, 1996, Mr.

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[5] Mr. Hardin twice listed the three tasks comprising the goose neck dropper job. Eliminating that duplication reduces the total number of tasks to 33. Mr. Hardin also included four tasks comprising the laundry worker and picker jobs that IBP provided to accommodate Mr. Gibson's injuries. Those four tasks should not be included in determining the task loss as they were only temporary accommodations rather than jobs in the open labor market that constituted substantial and gainful employment. Therefore, Mr. Hardin's list is further reduced to a total of 29 tasks.

Gibson's wage loss is 48 percent as that is the difference between the stipulated pre-injury average weekly wage of $486.59 and the $255.20 that he earns as a sewing machine operator.

## CONCLUSIONS OF LAW

1. The Judge found that Mr. Gibson injured both wrists as a result of the work activities that he was performing for IBP. The Appeals Board agrees. The greater weight of the evidence indicates that Mr. Gibson sustained simultaneous repetitive use injury to both wrists and arms while working for IBP through his last day of work for that company on January 31, 1996.

2. When both hands and arms are simultaneously injured, the injury is compensable as an injury to the body rather than a "scheduled" injury despite the fact that the symptoms in each upper extremity began at different times.[6]

3. In Treaster,[7] the Kansas Supreme Court recently held that the appropriate date of accident for repetitive use injuries is the last date that a worker engages in the offending work activity. In Treaster, the Kansas Supreme Court approved the principles in Berry,[8] in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the injury is the reason that the worker leaves work.

4. Considering the legal principles of Treaster, Depew, and Berry, the Appeals Board concludes that Mr. Gibson has sustained simultaneous injury to both wrists and arms that constitutes an injury to the body rather than two separate scheduled injuries. Further, the appropriate date of accident for this claim is Mr. Gibson's last day working for IBP on January 31, 1996.

5. IBP, Inc., has raised timely notice of the accidental injury as an issue in this case. The Workers Compensation Act requires workers to give notice of their accident or injury within ten days of when it occurred. But that ten-day period may be extended to 75 days if the worker can prove that the failure to notify the employer within the initial ten-day period was due to just cause. And the employer's actual knowledge of the accidental injury renders the giving of such notice unnecessary.[9]

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[6] Depew v. NCR Engineering & Manufacturing, 263 Kan. 15, 947 P.2d 1 (1997).

[7] Treaster v. Dillon Companies, Inc., Docket No. 80,830 (Kan. 1999).

[8] Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[9] K.S.A. 44-520.

6. The Appeals Board agrees with the Judge that IBP had timely notice of Mr. Gibson's injuries. Mr. Gibson sustained repetitive use injury to both wrists and arms and IBP was well aware of those injuries and was providing medical treatment for them for several months before Mr. Gibson's last day of work in January 1996. The argument that IBP lacked timely notice is disingenuous.

7. IBP, Inc., also argues that any award to Mr. Gibson should be limited to medical benefits only. For the date of accident involved in this claim, the Act provides that an employer is not liable for permanent partial disability benefits for an injury that "does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed."[10] The Judge ruled that IBP failed to timely raise that issue as it was first raised in IBP's September 1998 submission letter. The Appeals Board agrees with that conclusion.

8. Should an appellate body conclude that IBP timely raised the issue, the Appeals Board concludes that Mr. Gibson was disabled for more than one week from *the work at which he was employed.* The purpose of K.S.A. 44-501(c) was to remove certain minor injuries from eligibility for a permanent partial disability award. But where an injury requires one-handed work, lighter work, or accommodated work for one week or more, the injury is not minor and the worker should be eligible for permanent partial disability benefits if the evidence otherwise establishes permanent injury or impairment.

9. Mr. Gibson's injury disabled him the requisite period of time as set forth by K.S.A. 44-501(c). First, IBP moved Mr. Gibson from his regular work as a round seamer to a one-handed picker and then into the laundry. Mr. Gibson was restricted from performing his regular work and was limited to accommodated work for more than one week. Therefore, the statute is satisfied as Mr. Gibson was unable to perform the work at which he was employed for more than a week. Second, because of his injuries and work restrictions, Mr. Gibson was placed on a one-year leave of absence. That also establishes that Mr. Gibson's disability continued beyond the prerequisite one-week period.

10. Because Mr. Gibson has sustained simultaneous injuries to both arms, he has an "unscheduled" injury and he is entitled to receive permanent partial general disability benefits as defined in K.S.A. 44-510e. That statute provides:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the

[10] K.S.A. 44-501(c).

> injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[11] and Copeland.[12] In Foulk, the Court of Appeals held that workers could not avoid the presumption against work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that their employer had offered. In Copeland, the same Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages would be based upon ability rather than actual wages when they failed to make a good faith effort to find appropriate employment after recovering from their injury.

11. The Appeals Board concludes that Mr. Gibson made a good faith effort to find appropriate employment after he was placed on leave of absence on January 31, 1996. In addition to checking the bid board on a weekly basis, he also contacted other potential employers in the Emporia area but he was unable to find work. The fact that Mr. Gibson promptly found a job following Dr. Moore's issuing permanent work restrictions and limitations is another indication that Mr. Gibson exercised good faith in looking for work.

12. For the period from February 1, 1996, to November 1, 1996, Mr. Gibson has a 100 percent difference in pre- and post-injury wages and a 52 percent task loss, which creates a 76 percent permanent partial general disability. For the period commencing November 1, 1996, Mr. Gibson has a 48 percent difference in pre- and post-injury wages and a 52 percent task loss, which creates a 50 percent permanent partial general disability. Mr. Gibson's award should be based on those disability ratings.

13. The Appeals Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

14. Mr. Warner is reminded that profanity is neither warranted nor appreciated at oral argument.

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[11] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

## AWARD

**WHEREFORE**, the Appeals Board modifies the October 14, 1998 Award as follows:

Jeffrey Gibson is granted compensation from IBP, Inc., for a January 31, 1996 accident and resulting disability. Based upon an average weekly wage of $486.59, for the period from February 1, 1996, through October 31, 1996, Mr. Gibson is entitled to receive 39 weeks of benefits at $324.41 per week, or $12,651.99, for a 76 percent permanent partial general disability. For the period commencing November 1, 1996, Mr. Gibson is entitled to receive 168.50 weeks of benefits at $324.41 per week, or $54,663.09, for a 50 percent permanent partial general disability. The total award is $67,315.08.

As of December 15, 1999, there is due and owing to the claimant 39 weeks of permanent partial general disability compensation at $324.41 per week in the sum of $12,651.99, plus 162.86 weeks of permanent partial general disability compensation at $324.41 per week in the sum of $52,833.41, for a total due and owing of $65,485.40, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $1,829.68 shall be paid at $324.41 per week until further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this ____ day of December 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas M. Warner Jr., Wichita, KS
Jennifer L. Hoelker, Dakota City, NE
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director